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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FLORIDA EAST COAST RAILWAY COMPANY,
APPELLANT
v. No. 638
UNITED STATES OF AMERICA, ET AL

CITY OF TAMPA, FLORIDA, APPELLANT
v. No. 639
UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, ET AL

SOUTHERN RAILWAY SYSTEM, APPELLANT
v. No. 641
UNITED STATES OF AMERICA

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF AMICUS CURIAE OF THE TAMPA PORT AUTHORITY

JAMES M. WEAVER
Attorney and Authorized Law Officer for
Tampa Port Authority
Foot of Grant Street
P. O. Box 981
Tampa, Florida

November 23, 1966

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BRIEF AMICUS CURIAE OF THE TAMPA PORT AUTHORITY

Statement

Tampa Port Authority is a political subdivision of the State of Florida, created by Chapter 23338, laws of Florida, special acts of 1945, as from time to time amended.[1]

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[1] Citations to the original act and amendments prior to 1963 are found in Chapter 63-1400, laws of Florida, special acts of 1963, which changed the name to Tampa Port Authority. It is printed as Appendix A hereto.

This brief *amicus curiae* is presented for the Tampa Port Authority, sponsored by James M. Weaver, Esq., its authorized law officer and a member of the bar of this Court, and is submitted pursuant to Rule 42(4) of the Rules of this Court, and Tampa Port Authority respectfully prays that the Court receive and consider this its brief *amicus curiae*.[2]

The Interest of the Amicus Curiae

Tampa Port Authority aligns itself with the appellants in opposition to the merger of the Seaboard and the Coast Line as now authorized and approved by the Commission. Tampa Port Authority is charged by Section 7 of the statute of its creation, among other things, with "* * * the specific responsibility of planning, and carrying out plans, for the long range development of the facilities of and traffic through the Port in the Port District."[3]

The most important traffic through the port of Tampa with which lies the concern and interest of Tampa Port Authority as *amicus curiae* is the outbound movement of phosphate rock. The movement of phosphate rock is, likewise, of vital importance to the applicant Railroads.

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[2] Short form names for the applicants and the Interstate Commerce Commission are used throughout, and the Seaboard and the Coast Line are referred to together as the "Railroads." Page numbers in parentheses, unless otherwise indicated, refer to the report of the Commission in 320 I.C.C. p. 122-214, and the dissent by Commissioners Webb and Tucker, 320 I.C.C. p. 214-246, and the appendices, p. 247-269.

[3] Section 7 also provided that the Port Authority should endeavor to attain that objective through encouraging and facilitating the investment of private capital. The requirements in that connection were slightly modified by Chapter 63-1399, laws of Florida, special acts of 1963, which is printed as Appendix B hereto.

The Commission made no specific findings as to what portion of the applicant's revenues or profits are generated by the carriage of long-haul bulk products, particularly phosphate rock originating in central and western Florida. The Commission, however, has very full and comprehensive judicial knowledge of those facts as the all-rail movement of phosphate rock from the central and western areas of Florida to interior points has been before the Commission in many proceedings.[4]

In *Routing, Cancellation, Phosphate Rock, Seaboard A.L.R. Co.*, 299 I.C.C. 147, at pages 148-149, the Commission said:

> "Phosphate rock originates in Florida principally in an area known as the pebble-rock district, approximately 41 miles east of Tampa, Fla., and about 200 miles south of Jacksonville. There are 16 points in Florida at which this traffic originates, 9 of which are served by the Seaboard and the Coast Line, 4 are local points on the Seaboard, and 3 are situated locally on the Coast Line. Thus the Seaboard and the Coast Line are in direct competition for this traffic at origin, which, from a revenue standpoint, is by far one of the most important of the commodities transported by these carriers."

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[4] *Atlantic Coast Line R. Co.* v. *Seaboard Air Line R. Co.*, 286 I.C.C. 669 (Sept. 2, 1952).

Atlantic Coast Line R. Co. v. Seaboard Airline R. Co., 291 I.C.C. 329 (Jan. 11, 1954) (Sustained in *Seaboard Air Line Railroad Co.* v. *United States*, 131 F. Supp. 129 (D.C.VA. 1954), affirmed 349 U.S. 902, rehearing denied 349 U.S. 941).

Routing, Cancellation, Phosphate Rock, Seaboard A.L.R. Co. 299 I.C.C. 147 (Sept. 26, 1956).

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Seaboard Air Line R. Co. Routing Cancellation, 301 I.C.C. 129 (June 26, 1957).

Omission of Routing on Phosphate Rock, 302 I.C.C. 275 (Nov. 12, 1957).

and in *Seaboard Air Line R. Co., Routing Cancellation*, 301 I.C.C. 129, at page 131, the Commission said, of the Seaboard:

> "The importance of the phosphate-rock traffic to the Seaboard is indicated by a showing that in the years, 1951, 1952, 1953, 1954, and 1955 this traffic represented, respectively, 21.06, 22, 22.66, 23.95, and 19.68 percent of all carload freight tonnage moved by it in those years, and yielded 12.70, 12.32, 12.83, 13.72, and 11.26 percent of its total carload freight revenue. No other single commodity transported by the Seaboard is as important to it either from a revenue or tonnage standpoint."

There would seem to be little doubt that there is likewise, as to the Coast Line, no other single commodity as important to it either from a revenue or tonnage standpoint.

Additionally, apart from the records in the proceedings cited in footnote 4 above, the Freight Commodity Statistics put out by the Commission's own Bureau of Transport Economics and Statistics gives by years up to and including the year ended December 31, 1963, the total carload freight revenue and the revenue from phosphate rock (item 343) for the Seaboard and the Coast Line. For the year ended December 31, 1962, for example, being the last full year preceding the approving order of December 2, 1963, the total carload freight revenues of the Seaboard and the Coast Line were, respectively, $137,954,032 and $144,993,826 and their respective revenues from phosphate rock were $13,695,608 and $13,650,495. We are indeed in an ad-

ministrative wasteland if the gatherer of the facts is precluded from their knowledge and if they are to be withheld from consideration by the Courts in reviewing administrative action.

In view of the importance of the movement of phosphate rock to these carriers, and the vital importance of considering the effect of the removal of all competition in respect of that traffic, it is difficult to pass off as ineptness of the Department of Justice the failure of this record to show those vital facts. Rather it stands as a reproach to the Commission, but, as pointed out hereinafter under the Argument, there is ample evidence to show that the findings of the Commission respecting the competition remaining in the movement of phosphate rock are not supported by the evidence and should not survive judicial review.

Tampa Port Authority Is Not Guilty of Laches

At December 2, 1963, the date of the Commission's approving order herein, all of the facilities at the port of Tampa for the transfer of phosphate rock from rail cars to vessels were owned and operated by the Railroads and had been so owned and operated by the Railroads for many years, and at that time the Tampa Port Authority relied upon (a) the Commission's analysis of the continuance of adequate competition and (b) the protective conditions attached by the Commission to its approval order and found in Appendix XI (320 I.C.C. at p. 267-269).

Developments since December 2, 1963, including a decision by the Commission as recently as three weeks ago (November 8, 1966) have compelled the Tampa

Port Authority to the conclusion (a) that the merger of the Seaboard and the Coast Line as now authorized and approved by the Commission will work irreparable harm to the port of Tampa which the Commission's protective conditions will neither prevent nor ameliorate and (b) that the Commission's analysis in respect of the continued existence of competition in the movement of phosphate rock is faulty and that in respect of such movement the Commission's findings are not based on substantial evidence, and, in fact, in one very important respect are based upon a plain misstatement of facts of record.[5]

The developments subsequent to December 2, 1963, which have influenced the Tampa Port Authority, may be summarized as;

(1) the efforts of the Railroads by their joint application in Finance Docket No. 23688 filed June 14, 1965 presently being pressed vigorously before the Commission on exceptions to an adverse examiner's report served September 9, 1966, which if successful would take away from the port of Tampa all of the outbound water borne movement of phosphate rock,[6] and

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[5] The following finding appears on page 151:

> "In 1960, the total waterborne traffic at Tampa was particularly heavy, consisting of 6 million tons of inbound traffic and 2.7 million tons of outbound traffic."

This statement fails to include or to give any consideration or effect to the 3.2 million tons of phosphate rock moving outbound from the port of Tampa to foreign ports (p. 321).

[6] In footnote 19, on page 27, of the joint motion of the appellees to affirm there appears to be an inuendo that the City of Tampa is opposing the merger for an ulterior purpose, i.e. to insure the continued movement of phosphate rock through the port of Tampa. If that is an improper ground for opposing the merger, the Tampa Port Authority is guilty of the same impropriety. It considers that the movement of that traffic through the port of Tampa is vital to the continued existence of Tampa as a major port and that the port of Tampa is itself jeopardized by this merger which will destroy the last vestige of rail competition in the movement of this important commodity.

(2) the recommended denial by a hearing examiner of the proposal of the Tampa Phosphate Railroad Company in Finance Docket No. 23718 to provide a competitive and efficient form of transportation for phosphate rock to the port only, without participation in the all-rail movement to the interior so that, among other things, it would have control of its cars which would be returned from the port to the mines and dryers in "fast shuttle service" [7], and

(3) the denial by order served September 26, 1966, printed as Appendix C hereto, of the petition of Port Sutton, Inc. for leave to intervene in the merger proceeding before the Commission (Finance Docket No. 21215) notwithstanding the apparent authority of condition 13 of Appendix XL (320 I.C.C. p. 268) that any person having an interest in the subject matter at any future time may make application to the Commission for the modification of the protective conditions (Port Sutton, Inc. being a private interest owning all of the capital stock of the Tampa Phosphate Railroad Company) and

(4) the insistence by the Railroads upon the continued use of only an in-vessel rate for the movement of phosphate rock to the railroad owned and operated phosphate loading facilities at the port of Tampa, and the refusal of the Commission, in Docket No. 34619 and Docket No. 34619 (Sub. No. 1), by order served November 8, 1966, printed as Appendix D hereto, to require the Railroads to state separately the line haul rate and the port charges, so as to permit either Port Sutton, Inc. other private interests, or the Tampa Port Authority, to know the charges that would have to be met in constructing and operating phosphate loading facilities to keep the outbound water movement of phosphate rock moving through the port of Tampa.

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[7] Cf. *Illinois Central Railroad Company* v. *Norfolk and Western Railway Company*, 35 Law Week 4008 at p. 4011, decided by this Court November 14, 1966, in which that term is used.

ARGUMENT

This record does show that the total movement of phosphate rock for the year 1957-1958 was 12 million tons[a] and that half of that amount, or 6.1 million tons, moved all rail to interior points in the United States and Canada, and the other half, or 5.9 million tons, moved to the port of Tampa for movement beyond by water, and that of the 5.9 million tons moving to the port of Tampa for movement beyond by water, 2.7 million tons moved to other domestic ports and 3.2 million tons went to foreign ports (320 I. C. C. at p. 231). That differentiation is necessary for the proper analysis and appraisement of the Commission's findings respecting the effects of the merger, and, in particular, the Commission's reliance upon the continued existence of effective intramodal, or rail, competition.

The Commission found that the situation at Tampa and in the central and western portions of Florida was unique in that those areas were served by no other railroads except the Seaboard and the Coast Line (p. 164).

The Commission further found, or admitted, that (p. 166), "There is no question that there will be a significant reduction in rail competition in Florida". But then, in language of softness and delicacy, it suggests that rail competition will be preserved in respect of the all rail movement to the interior by the opening of the Jacksonville gateway to the Southern[b] and states its purpose and intent to open the Jacksonville gateway to

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[a] (320 I. C. C. at p. 151): " * * * of which 12 million tons, almost exclusively phosphate rock, essentially a commodity normally handled by rail were forwarded from Mulberry, Florida."

[b] (320 I. C. C. at p. 166): "However, the overall reduction in rail competition in the Southeastern States viewed as a whole will be relatively moderate when considered in the light of the alternative rail service that will be provided by competitors of the merged company at practically all of the major industrial centers throughout the affected area."

the Southern (p. 182); " * * * even though the effect of this condition may be to require the merged company to shorthaul itself with respect to certain of its originated traffic."

The suggestion that the opening of the Jacksonville gateway to the Southern will preserve intramodal competition in the all-rail movement of phosphate rock from Florida is little short of farcial. (Motion of appellees, to affirm, pages 28-30). The life blood of the phosphate shippers is the supply of cars, and the Southern can supply no cars to the phosphate shippers in central and western Florida. The retalitory power of the merged road in the matter of car supply will be instantaneous and lethal, and it is simply contrary to human experience seriously to believe that any amount of solicitation on the part of the Southern will induce the phosphate shippers to short-haul the merged road by specifying routing via the Southern beyond Jacksonville.

As to intermodal competition for this movement of 6.1 million tons moving all-rail to interior points, it is perfectly apparent that it cannot be provided by trucks, and the suggestion of the Commission that the movement of the 2.7 million tons moving to the port of Tampa and thence by water to domestic points is competetive with the all-rail movement [10] would appear to be simply contrary to the fact.

The Railroads do not now and presumably the merged road will not publish joint rates and through routes via Tampa with the water cariers. The movement of that 2.7 million tons to domestic destinations is something that exists now and is not something that will replace the future disappearance of any rail competition in the movement of phosphate rock from central and

[10] (320 I.C.C. at p. 152): "That this water movement is to a large extent competitive with rail is reflected by the fact that nearly all of such traffic originated and terminated at points served by American and Canadian railroads."

western Florida to interior points all-rail. It is and will remain simply to destinations which the Railroads deem it non-compensatory to serve and with respect to which they are quite content to receive their in-vessel revenue on the haul to the port of Tampa.

With respect to the 3.2 million tons moving to the port of Tampa for export to foreign ports, the suggestion that there can be substitute rail competition in the haul to the port obviously cannot be made. As to that 3.2 million tons the only possible competition would be from the trucks and there is no meaningful discussion or finding in the Commission's report as to the extent or volume of the truck movement of phosphate rock to the port of Tampa for movement beyond by water.

Tampa Port Authority confesses its complete inability to understand the statement in the Commission's report that (p. 153), "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock." To the Tampa Port Authority it is not only not apparent but such intermodal competition as may exist is wholly insufficient and inadequate to compensate for the intramodal competition that will have been destroyed beyond recall, unless, of course, either the Commission grants the application of the Tampa Phosphate Railroad in Finance Docket No. 23718, or permits Port Sutton, Inc., to intervene in Finance Docket No. 21215 and imposes the additional protective condition permitting the construction and operation of the Tampa Phosphate Railroad Company. Due to the inaccesability of the latter's proposed trackage and the "captive" nature of much of the phosphate rock, the adverse effect on the merged road would be much less than that of the protective conditions permitting the Southern access to the St. Regis plant at Quinlan, Florida (320 I. C. C. at p. 268).

Conclusion

The Tampa Port Authority respectfully submits that with respect to the movement of phosphate rock as a whole, both all-rail to interior points in the United States and Canada, and also to the port of Tampa for movement beyond by water to domestic and foreign ports, the findings of the Commission that (p. 167): (1) the reduction of rail competition will not be substantial; (2) ample competitive rail service will remain; and (3) such reduction in competition as will result will have no appreciably injurious effect upon shippers and communities, are not supported by substantial evidence on the record viewed as a whole.

Tampa Port Authority further respectfully submits (a) that the Motion to Affirm made by the Appellees should be denied, (b) That this Court should note probable jurisdiction, and (c) after hearing and consideration should reverse the order of the Court below with directions to enjoin permanently the Commission's approving order of December 2, 1963.

Respectfully submitted,

JAMES M. WEAVER
Attorney and Authorized Law Officer for
Tampa Port Authority,
Foot of Grant Street
P. O. Box 981
Tampa, Florida

November 23, 1966

APPENDIX A

CHAPTER 63-1400

SENATE BILL NO. 1077

AN ACT to change the name of the Hillsborough county port authority, the governing body of the Hillsborough county port district, to Tampa port authority and to provide for the amendment of chapter 23338, laws of Florida, special acts of 1945, as amended: chapter 24577 and chapter 24578, laws of Florida, special acts of 1947; chapter 25879, laws of Florida, special acts of 1949; chapter 27600, laws of Florida, special acts of 1951; chapter 30820, laws of Florida, special acts of 1955; chapter 57-1380, laws of Florida, special acts of 1957; and chapter 59-1358, laws of Florida, special acts of 1959 in order to accomplish this name change.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That the name of the governing body of the Hillsborough county port district shall be "Tampa port authority" and that wherever the term "Hillsborough county port authority", "port authority" or "authority" shall be used in chapter 23338, laws of Florida, special acts of 1945, as amended: chapter 24577 and chapter 24578, laws of Florida, special acts of 1947; chapter 25879, laws of Florida, special acts of 1949; chapter 27600, laws of Florida, special acts of 1951; chapter 30820, laws of Florida, special acts of 1955; chapter 57-1380, laws of Florida, special acts of 1957; and chapter 59-1358, laws of Florida, special acts of 1959 and all other laws enacted by the legislature of the state of Florida, it shall mean the Tampa port authority which henceforward shall be the name of the governing body of the Hillsborough county port district.

Section 2. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 3, 1963.

APPENDIX B

CHAPTER 63-1399

SENATE BILL NO. 1076

AN ACT to amend chapter 23338, Laws of Florida, special acts of 1945, as amended, by amending the introductory paragraph of Section 7 of such chapter in order to provide for no more than sixty (60) days notice of a public hearing when the Hillsborough County port authority is considering acquiring the ownership, control or operation of any project with the purpose of such notice being to permit private capital to consider the erection, installation and operation of such a project.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That notwithstanding the provisions of the introductory paragraph of section 7 of chapter 23338, laws of Florida, special acts of 1945, as amended, the Hillsborough county port authority shall, before it acquires the ownership, control or operation of any project give sixty (60) days notice of a public hearing thereon as to any project the value of which at the time of such notice is reasonably estimated to exceed one hundred thousand dollars ($100,000.00) by advertising in a newspaper of general circulation published in the port district, at least once each week for four (4) weeks prior to such hearing, said first publication to be at least sixty (60) days before said hearing, which notice shall state among other things that, unless definite arrangements are made by private capital to erect, install and operate such a project, the port authority will consider doing so. It is the purpose of this notice procedure to give private capital the opportunity to engage in the business of the project described in said notice should such private capital be willing so to do.

Section 2. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 3, 1963.

APPENDIX C

SERVICE DATE
September 26, 1966

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D.C., on the 8th day of September, 1966.

Finance Docket No. 21215

SEABOARD AIR LINE R. CO.—MERGER—
ATLANTIC COAST LINE

Upon consideration of the record in the above-entitled proceeding; the petition for leave to intervene, reopening, reconsideration, and further hearing, dated February 25, 1966, filed by Port Sutton, Inc.; the Addenda accompanying said petition; the reply to the petition by Seaboard Air Line Railroad and Atlantic Coast Line Railroad Company, filed March 10, 1966; and

It appearing, That, notwithstanding full opportunity being accorded interested parties to intervene in and become parties to the above-numbered proceeding and to present evidence in respect of the issues involved therein, petitioner neither sought nor made intervention therein and did not participate in the proceeding during the time it was pending before the Commission;

It further appearing, That, now, more than 5 years after the instant proceeding was instituted and more than 2 years after issuance by the Commission of its decision therein (*Seaboard Air Line R. Co.-Merger-Atlantic Coast Line,* 320 I.C.C. 122), petitioner seeks leave of the Commission to intervene and to become a party to the proceeding, and requests reopening of the proceeding, reconsideration, and limited further hearing;

It further appearing, That the aforementioned decision of the Commission is now before the Courts on appeal;

It further appearing, That, concurrently with the filing of the instant petition with the Commission, petitioner also filed with the United States District Court, Middle District of Florida, Jacksonville Division, before whom said appeal was pending, a petition for leave to intervene in the instant proceeding and a suggestion that, if the court deemed action by it necessary to the resumption of jurisdiction over the proceeding by this Commission, it enter an appropriate order permitting a remand of the proceedings for the limited purpose specified in that petition;

It further appearing, That, by order entered by said Court on March 9, 1966, said petition was denied but without prejudice to petitioner taking such action, if any, before this Commission, as may be in keeping with its rules;

It further appearing, That, by way of justification for the delayed filing of its petition herein, petitioner refers to the filing, on June 14, 1965, by the applicants herein of their joint application in Finance Docket No. 23688 for authority to construct and operate a line of railroad extending from a point in the phosphate territory of Polk County, Florida, to a new port terminal facility at Piney Point in Manatee County, Florida, and asserts that such filing has the effect of so substantially changing the issues in the instant proceeding to the extent they relate to rail service in the Port Tampa, Florida, area, as to warrant the granting of the intervention and other relief here requested;

It further appearing, That there is only a remote relationship between the proposal in Finance Docket No. 23688 and those involved in the instant proceeding; that no proper basis exists for the presumption that either the granting or the denial of the authority sought in Finance Docket No. 23688 would have any appreciable bearing upon any of the issues involved in the instant proceeding; and that, accordingly, good cause has not been shown for the granting, at this late date, of the intervention here requested;

It further appearing, That no fact or circumstance has been presented or suggested by petitioner warranting the reopening of the instant proceeding, upon the Commission's own motion, for the purpose of modifying the conditions imposed in the Commission decision in the instant proceeding; and

It further appearing, That no proper basis has been established for the granting of any of the relief requested by petitioner herein:

It is ordered, That the petition be, and it is hereby, denied.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

SERVICE DATE

November 8, 1966

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 24th day of October, A. D. 1966.

No. 34619[1]

GREATER TAMPA CHAMBER OF COMMERCE
v.
ATLANTIC COAST LINE RAILROAD COMPANY
ET AL.

Upon consideration of the record in the above-entitled proceedings; the petition filed on July 18, 1966 by the complainants for reconsideration of the report and order of the Commission, Rates and Practices Review Board, decided on June 8, 1966; and reply thereto filed on August 22, 1966 by defendants:

It is ordered, That the petition be, and it is hereby, denied for the reason that it does not present sufficient grounds to warrant granting the action sought.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

[1] Embraces also No. 34619 (Sub-No. 1), Tampa Port Authority v. Same.